Filed 2/24/05 Arthur v. Blodget CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JUDITH ANN ARTHUR, as Trustee, etc., et al.,

Plaintiffs and Respondents,

v.

PAULA BLODGETT,

Defendant and Appellant.

F045445

(Super. Ct. No. 24699)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Hugh M. Flanagan, Judge.

Law Offices of Bruce Francis Kennedy and Bruce Francis Kennedy for Defendant and Appellant.

Callister & Hendricks, Michael L. Monson, Bruce J. Hendricks and Jerry E. Callister for Plaintiff and Respondent Judith Ann Arthur.

Canelo, Wilson, Wallace & Padron and James H. Wilson for Plaintiffs and Respondents Michael Lee Blodgett, Ronald Scott Blodgett, and Brian David Blodgett.

-ooOoo-

STATEMENT OF THE CASE

On January 22, 2004, Judith Ann Arthur, Trustee of the Living Trust of Geneva Ann Shackelford (Trustee), filed a petition in the Merced County Superior Court for an order interpreting the language of a trust instrument, determination of beneficiaries, and instructions (Prob. Code, § 17200, subds. (b)(1), (4), (6)).

On the same date, Trustee filed points and authorities in support of her petition.

On February 23, 2004, Michael Lee Blodgett, Ronald Scott Blodgett, and Brian David Blodgett, the sons of a deceased trust beneficiary Newton Lee Blodgett, filed a written joinder to the Trustee's petition.

On the same date, Paula Beth Blodgett, surviving spouse and special administrator of the estate of the deceased trust beneficiary, filed written objections and a response to the Trustee's petition. On March 5, 2004, Paula Beth Blodgett filed a written verification of her pleadings and a copy of the Mariposa County Superior Court order admitting the last will and testament of her deceased husband for probate.

On March 12, 2004, the Merced County Superior Court conducted a contested hearing on the petition and took the mater under submission.

On March 29, 2004, the Honorable Hugh M. Flanagan, judge of the superior court, filed a formal order holding that Newton Lee Blodgett did not have the power or authority to appoint his interest in the Shackelford trust to Paula Beth Blodgett at the time of his death.

On April 27, 2004, Paula Beth Blodgett filed a timely notice of appeal.[1]

---

[1] An appeal may be taken from an order made appealable by the provisions of the Probate Code. (Code Civ. Proc., § 904.1, subd. (a)(10).) Generally speaking, with respect to a trust, the grant or denial of any final order under chapter 3 (commencing with section 17200) of part 5 of division 9 of the Probate Code is appealable. (Prob. Code, § 1304, subd. (a).) Under the chapter, a trustee or beneficiary of a trust may petition the court concerning the internal affairs of the trust or to determine the existence of the trust.

STATEMENT OF FACTS

Geneva Ann Shackelford, a resident of Hornitos Ranch, had four children, Newton Lee Blodgett (born April 8, 1936), Judith Ann Arthur (born August 8, 1938), Barbara Jean Lusar (born May 1, 1952), and Walter Scott Shackelford (born April 10, 1955). On September 14, 1979, Geneva executed a revocable living trust instrument in duplicate. Under the instrument, Shackelford directed that net income from the trust estate be distributed for her benefit during her lifetime, and provided that upon her death the trust would become irrevocable and the trust estate would be apportioned into shares, with one full share allocated to each of her then living children and one full share for the then living lawful descendants of each deceased child, if any. The trustor directed that net income from each trust apportioned to a child, or the living lawful descendants of a deceased child, be distributed at least quarterly. Upon the death of each child, or lawful descendant of a deceased child, the trustor directed that the deceased beneficiary's share be apportioned in partial shares among his or her living lawful descendants upon the principle of representation. The trustor provided that her children would have no right to withdraw the principal of their respective shares. However, she granted a living, lawful descendant of each child the right to withdraw up to one-half of his or her share of the principal at age 21 and the right to withdraw the balance at age 30.

(Prob. Code, § 17200, subd. (a).) Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings to (a) determine the questions of construction of a trust instrument (*id.*, § 17200, subd. (b)(1)); (b) determine the existence of any immunity, power, privilege, duty, or right (*id.*, § 17200, subd. (b)(2)); (c) ascertain beneficiaries and determine to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument (*id.*, § 17200, subd. (b)(4)); and (d) instruct the trustee (*id.*, § 17200, subd. (b)(6)), among others. Pursuant to these provisions, the order filed March 29, 2004 in the instant case is appealable.

The trustor also granted "a living lawful descendant for whom a trust is then held" a power of appointment to be exercised in his or her last will admitted to probate by a court of competent jurisdiction. Pursuant to that provision, the trustor directed the trustee to distribute from the pertinent trust "the amount appointed, not in excess of the aggregate amounts previously subject to withdrawal but not so withdrawn as of the date of death of such descendant." The trustor limited the beneficiaries of the power of appointment to "such person or persons among the Trustor's lawful descendants and their spouses."

In the declaration executed the same day as the trust instrument, Shackelford transferred real property, bank accounts, and an account receivable into the name of the trust, named herself as the initial trustee, and named two of her children, Newton Lee Blodgett and Judith Ann Arthur, as her successor cotrustees.

Geneva died on June 2, 1995 and, after that date, Newton and Judith served as successor cotrustees. Newton died on July 27, 2003 and Judith began serving as sole successor trustee. Newton had executed a last will and testament in the town of Hornitos, County of Mariposa on February 24, 2003. Article III of the will stated:

> "I direct that after payment of all my just debts, my property be bequeathed in the manner following: My income (25%) from Geneva A. Shackelford Trust, and any related income, be given to my wife, PAULA BETH BLODGETT until her death, at which time, all these incomes will be reverted to my (3) three sons - 1 – MICHALE LEE BLODGETT, 2 – RONALD SCOTT BLODGETT, 3 – BRIAN DAVID BLODGETT."

At his death, Newton was survived by his wife, Paula Beth Blodgett, and three sons from a prior marriage, Michael, Ronald, and Brian. Paula petitioned for probate of Newton's will. On February 18, 2004, Paula executed a declaration authenticating Newton's handwriting in the February 24, 2003 last will and testament. The Mariposa County Superior Court admitted Newton's will to probate on February 26, 2004 and appointed Paula executor of his will. Letters testamentary issued on that date.

On January 22, 2004, Judith filed a petition for order interpreting the trust instrument, determining beneficiaries, affirming her authority and appointment to act as sole trustee, and for instructions. Judith specifically alleged that Newton had no power of appointment over his 25 percent share of the trust income because paragraph D.(3) of article Fourth provided that Geneva's children had no right to withdraw principal from the trust estate.

On February 23, 2004, Newton's three sons filed a joinder in Judith's petition. They expressed no objection to Judith serving as sole trustee, they expressed their belief in the validity of the trust, and they maintained their father had no power of appointment over his 25 percent share of the trust estate because the trust instrument precluded Geneva's children from withdrawing the principal from their shares.

On the same date, Paula filed written objections and a response to Judith's petition. She argued in relevant part:

> "... PAULA believes that the manifest interpretation and plain meaning of Subsections C.(3) and C.(4) and of Subsection E. of Article FOURTH of the Trust is that GENEVA granted to each of her children upon his or her death a power of appointment of his or her share of the Trust to any person among GENEVA'S lawful descendants, including such person and that person's spouse, **subject only to a limitation as to the manner of its exercise** (i.e., as he or she '*appoints and directs by his last Will admitted to probate by a court of competent jurisdiction, specifically referring to this power of appointment'* [emphasis in original] as set forth in the provisions of Subsection E. of Article FOURTH of the Trust." (Fn. omitted.)

On March 12, 2004, the court conducted a contested hearing on Judith's petition and took the matter under submission. On March 29, 2004, the court filed a formal order stating in relevant part:

> "The court accepts the stipulation by all parties that the trust is valid and will so find. The court will also accept the stipulation that the present trustee serving as sole trustee can continue as sole trustee without need at this point to appoint a co-trustee.

"The court finds that the purported assignment of interest in the trust by Newton Lee Blodgett is not effective in conveying his then present or now future interest. The court finds that Newton Lee Blodgett had no power to deny the interest of his three sons upon his death.

"The court finds the coupled appointment of Newton Lee Blodgett's interest [in]consistent with the specific terms of the trust. The court is particularly persuaded in so finding by the wording in paragraph 'E' on page 5 of the trust and the reference therein to 'living lawful descendant' when read with the rights of withdrawal vested only in the trustor's grandchildren and not her children. The court is also convinced that the appointment would not be proper because if it were proper it would defeat the express provisions of the trust as to grandchildren's rights in seeking the distribution of their interest in the trust on which they could request partial distributions at age 21 or full distribution. It is clear to the court that the trustor never contemplated appointment rights that would defeat the specific purpose of preserving of her property for her children and keeping the assets as a whole until a child['s] interests in the trust has past to the grandchildren.

"Based on the foregoing there are no assets of the trust in estate of Newton Lee Blodgett subject to appointment by Newton Lee Blodgett and Newton Lee Blodgett had no authority or power to appoint his interest in the Geneva Ann Shackelford trust to his wife at the time of his death, Paula Beth Blodgett. Paula Beth Blodgett will take nothing under the appointment or the will."

DISCUSSION

The parties agree that the sole issue on appeal is whether the trustor, Geneva Ann Shackelford, gave to her children, including her son Newton, a discretionary and testamentary power to appoint their income shares of the trust estate. More specifically whether the Geneva Ann Shackelford Living Trust granted Newton, the trustor's son, a power to appoint trust income to his surviving spouse, Paula, upon his death.

Paula contends the trust provisions reveal an intent to grant a discretionary and testamentary special power of appointment to Newton, as a child and lawful descendant of the trustor, Geneva Ann Shackelford.

Paula specifically argues: (1) each of Geneva's children received an equal income share of the trust subject to the provisions governing termination and distribution; (2) the

provisions for distribution on the death of a child manifest an intention by Geneva to give her children a testamentary and discretionary power of appointment; (3) although Geneva did not give her children a right to withdraw principal, that is still consistent with an intention to give them a power of appointment over their income shares of the trust; and (4) Geneva included both children and grandchildren under the trust provisions specifying the exercise of the power of appointment.

Absent a conflict in the relevant extrinsic evidence, the interpretation of a trust instrument is a question of law that an appellate court will consider de novo. In interpreting a trust instrument, we seek the intent of the trustor as revealed in his or her document considered as a whole. In addition, in interpreting a document such as a trust, it is proper for the trial court in the first instance and the appellate court on de novo review to consider the circumstances under which the document was made. In that way, the court may be placed in the position of the trustor whose language it is interpreting, in order to determine whether the terms of the document are clear and definite or ambiguous in some respect. (*Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439-1440.)

Particularly in the field of interpreting trusts and wills, each case depends upon its own peculiar facts and precedents have comparatively small value. Under California law, it is the intention of the trustor, not the trustor's lawyer, that is the focus of the court's inquiry. An ambiguity in a written instrument exists when, in light of the circumstances surrounding the execution of the instrument, the written language is fairly susceptible of two or more constructions. Where a trust instrument contains some expression of the trustor's intention, but as a result of a drafting error that expression is made ambiguous, a trial court may admit and consider extrinsic evidence. Such evidence can include the drafter's testimony. The purpose of the admission of such evidence is to resolve the ambiguity and give effect to the trustor's intention as expressed in the trust instrument. (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73-74.)

Under the instant trust instrument, Shackelford directed that net income from the trust estate be distributed for her benefit during her lifetime, and provided that upon her death the trust would become irrevocable and the trust estate would be apportioned into shares as follows:

> "[¶]…[¶] (1) One full share for each of the then living children of the Trustor,
>
> "(2) One full share for the then living lawful descendants of each deceased child of the Trustor, to be apportioned in partial shares among such descendants upon the principle of representation,
>
> "(3) Each such full or partial share shall constitute and be held, administered and distributed as a separate trust.
>
> "C. ... [T]he net income shall be distributed in convenient installments, not less frequently than quarterly, as follows:
>
> "(1) The net income from each trust apportioned for the benefit of a living child shall be distributed to or for the use and benefit of such child.
>
> "(2) The net income from each trust apportioned for the benefit of a living lawful descendant of a deceased child shall be distributed to or for the use and benefit of such descendant.
>
> "(3) Upon the death of each child or lawful descendant of a deceased child for whom a trust is then held, such trust, to the extent not appointed as hereinafter provided, shall be apportioned in partial shares among his or her living lawful descendants upon the principle of representation, which partial shares shall constitute and be held, administered and distributed as separate trusts and, while so held, the net income from each such descendant's trust shall be distributed to or for the use and benefit of such descendant.
>
> "(4) Upon the death of each child or lawful descendant of a deceased child for whom a trust is then held, leaving no living lawful descendants, such trust, to the extent not appointed as hereinafter provided, shall go to augment the other trusts then held and those previously distributed in whole or in part, upon the principle of representation of his nearest ancestor, not more remote than the Trustor, then having living lawful descendants; except that no such trust shall go to augment the trust of any child or descendant previously deceased who then has no living lawful descendants.

"D. The descendants of the Trustor shall have the right to withdraw principal as follows:

"(1) Whenever any living, lawful descendant of a deceased child shall have attained the age of twenty-one (21) years he may withdraw principal not to exceed one-half (1/2) of the trust then held for him; and upon having attained the age of thirty (30) years he may withdraw the balance of the principal of such trust.

"(2) All such withdrawals shall be made by written request filed with the Trustee. The Trustee shall continue to administer the principal, subject to withdrawal but not so withdrawn, under the terms and provisions of this Trust, and shall distribute the net income from such principal to or for the use and benefit of the beneficiary for whom it is then held. The right to make such withdrawals shall be a continuing right until the termination of the Trust, or the death of the beneficiary holding such right, whichever shall first occur, and such right shall include the power to appoint the principal subject to withdrawal, in the manner hereinafter specified.

"(3) A child of the Trustor shall have no right to withdraw the principal of that child's share.

"E. Upon the death of a living lawful descendant for whom a trust is then held, the Trustee shall distribute from such trust the amount appointed, not in excess of the aggregate amounts previously subject to withdrawal but not so withdrawn as of the date of death of such descendant, to or in trust for the use and benefit of such person or persons among the Trustor's lawful descendants and their spouses, upon such conditions and estates, and with such powers, in such manner and at such time or times as he appoints and directs by his last Will admitted to probate by a court of competent jurisdiction, specifically referring to this power of appointment. To the extent that this power of appointment is not exercised, then such trust shall go and be held or distributed as hereinbefore provided. Unless within ninety (90) days after the death of the holder of such power the Trustee has actual notice of the existence of a will or of probate proceedings, it shall be deemed for all purposes hereunder that such power of appointment was not exercised (but the provisions of this paragraph shall not affect any right which an appointee or beneficiary in default of appointment, may have against any distributee)."

A power of appointment is a power or authority given by a person to dispose of property or to an interest therein, which is vested in a person other than the donee of the power. (*Estate of Kuttler* (1958) 160 Cal.App.2d 332, 337.) Expressed another way, a

power of appointment is a delegation by the donor, in the disposition of his or her property, to the donee, who does not become the owner and only holds as trustee. (*Estate of Sevegney* (1975) 44 Cal.App.3d 467, 472.) Powers of appointment have been recognized as valid in California since the decision in *Estate of Sloan* (1935) 7 Cal.App.2d 319. (*Estate of Kuttler, supra,* 160 Cal.App.2d at p. 338.)

Probate Code sections 600 through 695 currently govern powers of appointment. Under these code sections, a "donor" is the person who creates or reserves a power of appointment and a "donee" is the person to whom a power of appointment is given or in whose favor a power of appointment is reserved. A "creating instrument" is the deed, will, trust, or other writing or document that creates or reserves the power of appointment. "Appointive property" means the property or interest in property that is the subject of the appointment and the "appointee" is the person in whose favor the power of appointment is exercised. (Prob. Code, § 610.)

A power of appointment is "testamentary" if it is exercisable only by a will. (Prob. Code, § 612, subd. (a).) A power of appointment is imperative when the creating instrument manifests an intent that permissible appointees be benefited even if the donee fails to exercise the power. All other powers of appointment are discretionary. The power of appointment at issue in the instant case is testamentary and discretionary because the trustor's declaration of trust refers to a descendant's right to withdraw and to appoint principal "as he appoints and directs by his last Will admitted to probate by a court of competent jurisdiction, specifically referring to this power of appointment." The declaration of trust further recognizes that the power of appointment may not be exercised, in which case "such trust shall go and be held or distributed as hereinbefore provided."

Newton Blodgett's last will and testament of February 24, 2003, stated:

> "I direct that after payment of all my just debts, my property be bequeathed in the manner following: My income (25%) from Geneva A. Shackelford

> Trust, and any related income be given to my wife, PAULA BETH BLODGETT until her death, at which time, all those incomes will be reverted to my (3) three sons – 1 – MICHALE LEE BLODGETT, 2 – RONALD SCOTT BLODGETT, 3 – BRIAN DAVID BLODGETT."

Blodgett's will consisted of a preprinted "E-Z Products" form with handwritten entries. Blodgett signed and dated the form and his wife, Paula Beth Blodgett, signed as the sole witness. Under California law, a witnessed will must be in writing and signed by the testator and witnessed by at least two persons, each of whom (a) is present at the same time and witnesses either the signing of the will or the testator's acknowledgment of the signing of the will, and (b) understands the instrument is the testator's will. (Prob. Code, § 6110, subds. (b), (c).)

A will that does not comply with the requirements of a witnessed will is valid as a holographic will, whether or not witnessed, if the signature and material provisions are in the handwriting of the testator. Because only the signature and material provisions must be in the testator's handwriting, a will may be a valid holographic will if immaterial provisions are printed or typed or even written by another person. (Prob. Code, § 6111, subds. (a), (c); 1 Cal. Estate Planning (Cont.Ed.Bar 2004) § 5.12, p. 158.) Here, the date, signature, and bequests of Newton Blodgett appear to be in his own handwriting and the Mariposa County Superior Court properly filed an order for probate of the last will and testament on February 26, 2004.

Thus, Newton Blodgett, in his last will, admitted to probate by a court of competent jurisdiction, specifically referred to a power of appointment created in the declaration of trust of Geneva Shackelford. The question then is whether Newton Blodgett was a "donee," a person to whom a power of appointment was given. (Prob. Code, § 610, subd. (d).) If the creating instrument specifies requirements as to the manner, time, and conditions of the exercise of a power of appointment, the power can be exercised only by complying with those requirements. (*Id.*, § 630, subd. (a).)

Appellant contends:

"Under Section D.(3) of the trust, Mrs. Shackelford denied to her children the right to withdraw the principal of their separate trusts; whereas under Section D.(1) she gave rights of withdrawal to her grandchildren upon their reaching certain ages, coupled with a power of appointment of remaining principal under Section D.(2). But the denial to her children of rights to withdraw principal during life, or even upon death, is not inconsistent with an intention to grant to them a discretionary power to direct income by a testamentary appointment, especially if the persons to whom the appointment may be made is limited, as it is in this case. [¶]...[¶]

"A power to withdraw principal entails considerations quite separate and distinct from those relative to a limited or special power of appointment. In 1979, when she created the trust, Mrs. Shackelford's children were all adults. Newton was in his mid-forties, and his siblings ranged in age from 24 to 41. Mrs. Shackelford's grandchildren, however, at that time were youngsters, ranging in age from 7 to 14.

"It is not unreasonable to surmise that Mrs. Shackelford denied her children the right to withdraw principal from their separate trusts, not only because she didn't want her children to be able to voluntarily dissipate the principal of their separate shares of the trust estate before the principal reached the level of her grandchildren, but also because she didn't want the shares of principal of the trust estate apportioned among her children to be involuntarily subjected to the claims of their creditors. [¶]...[¶]

"Moreover, a power to withdraw from principal that is tantamount to a general power of appointment of such principal, whether or not exercised, is includable in the holder's estate and subject to estate tax, whereas property subject to a special power of appointment is not so includable. Internal Revenue Code section 2041(a)(2). Thus Mrs. Shackelford's denying to her children a presently exercisable power to withdraw principal, but nevertheless providing to them a special power of appointment over their income shares of the trust, would be consistent with a purpose of tax avoidance and would prevent the inclusion of a child's share of the trust coming into his or her taxable estate and resulting in the possible imposition of federal estate taxes. [¶]...[¶]

"The amount subject to testamentary appointment by a child cannot be in excess of the aggregate amount previously withdrawn, but because Mrs. Shackelford did not give her children a right to withdraw principal during their lifetime, the amount subject to their power of appointment merely

> could not exceed the remaining balance of their proportionate share of the trust. It would seem obvious that a testamentary appointment of the right to receive income from the principal remaining in a child's separate trust to his or her spouse could not possibly be 'in excess of the aggregate amounts previously subject to withdrawal but not so withdrawn.'
>
> "It is Paula's belief, and a belief obviously held by her deceased husband, that Mrs. Shackelford intended that each of her children hold a power to appoint his or income share of the trust to their spouses or to the descendants of Mrs. Shackelford. If there is any ambiguity in the language of the trust with respect to the intention of Mrs. Shackelford to give her children a discretionary and testamentary special power of appointment over their income shares of the trust estate, Paula urges the Court to apply the interpretative preference set forth under the rules of construction of Probate Code section 21120 to avoid the failure of the transfer of Newton's income interests in the trust by his attempted exercise of a power of appointment, and to find that, taken as a whole ... Mrs. Shackelford intended that her children should have a power of appointment over the income interests in their separate shares of the trust estate."

Our first priority is to construe the trust according to the intention of the testator as expressed therein and this intention must be given effect as far as possible. Statutory rules of construction apply where the intention of the transferor is not indicated by the instrument. (*Burkett v. Capovilla* (2003) 112 Cal.App.4th 1444, 1449.) In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. (Code Civ. Proc., § 1858.)

Here, trustor Geneva Ann Shackelford did not expressly confer upon her four children a power of appointment over their respective income interests in her trust. The trustor's daughter-in-law, Paula Beth Blodgett, infers the existence of such a power from the language of article Fourth, paragraph E. of the declaration of trust. We must construe the parts of the declaration of trust to form a consistent whole. (Prob. Code, § 21121.)

Article Fourth of the instrument which sets forth provisions applicable upon the death of the trustor, may be diagrammed in the following manner:

A. Payment of expenses of trustor's last illness and funeral;

B. Upon death of trustor, apportionment of trust estate (without physical segregation) to provide:

(1) One full share for each then-living child of Trustor;

(2) One full share for the then living lawful descendants of each deceased child of Trustor; and

(3) Each share to constitute a separate trust.

C. Distribution of income at least quarterly in the following manner:

(1) Net income from each trust apportioned for a living child shall be distributed for the use and benefit of such child;

(2) Net income from each trust apportioned for the benefit of a living lawful descendant of a deceased child shall be distributed for the use and benefit of such descendant;

(3) Upon the death of each child or lawful descendant of a deceased child for whom a trust is then held, such trust, to the extent not appointed as later provided, shall be apportioned in partial shares among his or her living lawful descendants upon the principle of representation; and

(4) Upon the death of each child or lawful descendant of a deceased child for whom a trust is held, leaving no living lawful descendants, such trust, to the extent not appointed, shall augment other trusts then held upon the principle of representation to his or her nearest ancestor.

D. The descendants of the trustor shall have the right to withdraw principal as follows:

(1) When *a living, lawful descendant of a deceased child* attains age 21 he or she *may withdraw* up to one-half of the principal of the trust then held

for his or her and upon attaining age 30 he or she may withdraw the balance;

(2) The right to make such withdrawals is a continuing right until the termination of the trust or the death of the beneficiary holding the right, whichever first occurs and such right *includes the power to appoint the principal subject to withdrawal*; and

(3) *A child shall have no right to withdraw the principal of his or her share*.

E. Upon the death of a living lawful descendant for whom a trust is then held, the trustee shall distribute from such trust the amount appointed for the use and benefit of such person or persons among the trustor's lawful descendants and their spouses as he or she appoints and directs by last will admitted to probate by a court of competent jurisdiction, specifically referring to this power of appointment

In the interpretation of a will or trust, the instrument is to be examined with a view to discovering the decedent's testamentary scheme or general intention. The meaning of particular words, phrases, and provisions shall be subordinated to such scheme, plan, or dominant purpose. The entire scheme of disposition must be considered, the property disposed of, persons named as devisees and legatees. Words used should be considered in reference to the context and construed according to their surroundings. (*Estate of Raymond* (1950) 96 Cal.App.2d 808, 813-814.)

An examination of the structure of Geneva Shackelford's declaration of trust reveals an intention to provide her children an income interest but no right of withdrawal of trust principal. The structure of the trust instrument further reveals an intention to provide a power of appointment "... not in excess of the aggregate amounts previously subject to withdrawal but not so withdrawn as of the date of death of such descendant ...."

Article Fourth, paragraph C. provides that the net income shall be distributed for the benefit of a living child. Article Fourth, paragraph E. provides that the power of

appointment applies only to principal amounts subject to withdrawal but not withdrawn as of the date of death of such descendant. Only a "living, lawful descendent of a deceased child" is given the right to withdraw principal. As Judith, the successor trustee, points out, Newton received, during his lifetime, all of the trust income apportioned to him as a child of the trustor, Geneva Shackelford. The terms of the declaration of trust provide the power of appointment can be exercised only over trust principal, specifically amounts subject to withdrawal prior to death and not actually withdrawn. Thus, there was no sum or amount subject to Newton's withdrawal but not withdrawn at the time of his passing.

Judith further notes that Newton's sons have attained the age of 30 years. Under appellant's interpretation of the trust instrument, they would not now be able to withdraw their principal because Newton appointed his income interest to his widow, Paula. The trust instrument clearly provides a living, lawful descendant of a deceased child may withdraw up to one-half of the trust then held for him at age 21 and the balance of the principal of the trust at age 30. If the court were to adopt Paula's interpretation, this would impose an additional limitation or condition on a grandchild's right to withdraw principal from the trust. The California Supreme Court has held it is strictly within the powers of a court of equity to construe and enforce the various provisions of a trust, but it cannot set them aside. Moreover, a court of equity can neither create nor substitute provisions of a trust. (*Floyd v. Davis* (1893) 98 Cal. 591, 601.) Paula's interpretation of the trust instrument would essentially require this court to create or substitute provisions of the Living Trust of Geneva Ann Shackelford. This we may not do.

In interpreting the trust instrument, we seek the intent of the trustor as revealed in the document considered as a whole. (*Estate of Powell, supra,* 83 Cal.App.4th at p. 1440; *Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 452-453.) Here, Geneva Shackelford intended, upon the death of a child, to extend to the lawful, living descendants of that child the right to withdraw portions of the principal of that child's

trust upon a descendant attaining the ages of 21 and 30. Construction of her declaration of trust to permit the appointment of a child's income interest to a surviving spouse would interfere with, if not negate, that intent. We may not remake the trust instrument or substitute our judgment for that of the trustor. (*Moxley v. Title Ins. & Trust Co.* (1946) 27 Cal.2d 457, 462-464.)

The trial court properly held "the trustor never contemplated appointment rights that would defeat the specific purpose of preserving of her property for her children and keeping the assets as a whole until a child['s] interests in the trust has pas[sed] to the grandchildren."

DISPOSTION

The judgment (the order filed March 29, 2004) is affirmed. Costs on appeal to respondents.

_____
HARRIS, Acting P.J.

WE CONCUR:

_____
WISEMAN, J.

_____
LEVY, J.